

## **TIPS FOR CRAFTING A WINNING MOTION FOR SUMMARY JUDGMENT IN EMPLOYMENT LITIGATION**

### **Employment Litigation Skills Training**

Employee Rights and Responsibilities Committee of the ABA's  
Section of Labor and Employment Law

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#### **I. Encourage Clients to Protect Themselves Before Litigation is Even Contemplated**

- The best defense is often a good offense. Employers should be encouraged to consider whether their decision-making processes will withstand later scrutiny. It is always easier to defend a decision that was the result of a well thought out process than a decision made with little process or thought.
- Strong record keeping can help protect employers who are subject to litigation. Employers should maintain a well-organized paper trail surrounding major employment decisions. It is especially important to keep a record of warnings and other information regarding employee performance.
- Tailor advice to clients with a future summary judgment record in mind.

## **II. Learn the Case Early and Thoroughly**

- To set the stage for a strong summary judgment motion, it is essential to gather information quickly. Gather all relevant documents and talk to witnesses as soon as possible. This will allow you to create a comprehensive fact outline that you can supplement and correct throughout the information gathering stage of the litigation.
- Identify your legal strategy and case themes early in the process. Knowing what you will argue will allow you to tailor your fact finding and begin research.

## **III. Venue**

- Try to get the case into federal court. Federal judges tend to be far more receptive to summary judgment motions than their state court counterparts. Federal courts also tend to be less overstretched and may be able to devote more time to your motion.

## **IV. Make Depositions Count**

- Have your legal research done and motion outlined before taking depositions. Knowing what you will argue will allow you to pinpoint what admissions you need to make the strongest case for summary judgment. It is always possible to revise your strategy as needed later as more information becomes available.
- Make every effort to tie witnesses to their testimony. One tactic is to recap what a witness has told you during their testimony and ask them to confirm.
- It is always better to get the facts you need through a deposition than to rely on affidavits. As such, it is important to be very thorough when deposing witnesses. Always ask if there is anything you didn't ask about that may be relevant.
- Get the complete story from the plaintiff. A comprehensive understanding of the plaintiff's position and evidence is a key to winning on summary judgment. When deposing the plaintiff, be sure to have him identify all facts and evidence supporting his belief he was treated unlawfully. Have the plaintiff identify all decision makers and comparators. This will give you a good gauge of the strength of his claim and the likely points of contention at the summary judgment stage.
- Make sure all your witnesses are prepared and that you know what they will say. A witness who is confused or gives incorrect testimony can undermine attempts to prove that there are no issues of material fact.

## V. Writing the Motion

- Keep it short! While the instinct might be to include all relevant arguments, this can sometimes be unhelpful and overwhelming. Summary judgment motions should be kept simple and make the busy judge's job easy.
- Get the judge's attention right away. The first two paragraphs are often the most important because they create the lens through which the judge will read the rest of the motion. Be clear and persuasive.
- When writing the facts section:
  - Use the plaintiffs own testimony as much as possible.
  - Keep it brief. Short statements of fact are harder to dispute.
  - Avoid reliance on facts the other side will argue are disputed.
- Limit the length of exhibits and don't make the judge wade through the record. For example, include excerpts from depositions, not whole transcripts.
- Consider whether it makes sense to hold back arguments for an anticipated reply brief. It is important to strike the right balance between anticipating opposing counsel's arguments and wasting time or looking defensive. Over-anticipating arguments can be problematic as it can take the focus off your primary arguments. Further, the arguments you anticipate may never get made. On the other hand, there are situations where a reply brief is not allowed. There is also a risk that not addressing the plaintiff's arguments in the main brief will make it look like you are avoiding significant issues or even misleading the court. Think this through and decide on the right approach.
- Think about oral argument before submitting the brief. Does the brief hit the points you would want to make in 10 minutes?

## VI. Oral Argument Strategy

- During oral argument, keep the focus on key facts admitted by the plaintiff. This will allow you to minimize the impression that there are disputed issues of material fact and make the judge more comfortable granting summary judgment.
- Don't reread arguments or create areas of dispute for the sake of having something to say during argument. Focus on minimizing the appearance that there are facts in dispute.